IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 599 OF 1989

The State of Maharashtra]..Appellant

versus

1. Dilip Dattatraya Mohite]
age about 29 years]
Occ: Building Contractor,]
Residing at 1394, Kasba Peth]
Pune]
2. Rajendra Dattatraya Mohite]
age 21 years, Occ: Education]
Resident of 1394, Kasba Peth]
Pune
3. Sanjay Dattatraya Mohite]
age 26 years, Occ: Agriculture]
Resident of Shel-Pimpalgaon]..Respondents
Taluka Khed, District Pune](Ori. Accused)

Mr. P. A. Pol APP for the Appellants - State.

Mr. R. R. Bhonsale for the Respondents - Original Accused.

CORAM : D. G. DESHPANDE, &
S. R. SATHE, JJ.

DATE : 10TH JANUARY, 2007.

ORAL JUDGMENT : (Per : D. G. DESHPANDE, J.)

1. Heard learned APP for the Appellants - State and Counsel for the Respondents - Original Accused.

2. This appeal is filed by the State against

the acquittal of the accused from all the offences viz. under Section 302 read with section 34 of Indian Penal Code. So far as accused No.2 is concerned he is also acquitted of offence under Section 307 of IPC.

3. The incident in this regard is of 7.6.1988. The name of the deceased is Chandrakant who was elder brother of Ashok Kalaskar. This Kalaskar family had entrusted their plot at Budhwarpeth, Pune, for development to the accused No.1 Dilip Mohite and one Paul. The structure of the new building was complete excepting construction of walls and this construction of wall was in progress on 3rd floor. It is the case of the prosecution that the complainant i.e. Kalaskar brothers had a grievance that the accused without completing the work of the 1st floor were doing the work of 3rd floor. This was against the contract or agreement between the parties, and, therefore, Ashok and his brother Chandrakant went to the construction site on 7.6.1988 at about 10.30 a.m. They found that the construction of the 3rd floor was going on. Chandrakant questioned the mason as to how he was doing the work and ordered him to stop the work at

the site and one Charu who was the Supervisor went to inform this fact to the accused.

4. All of them came out at about 12 O'clock. Again Ashok and Chandrakant reached the 3rd floor. Accused came there and they questioned why construction was stopped. Chandrakant asked them to complete construction work on the ground floor as agreed earlier and then only to proceed with the construction of the 3rd floor. This was not accepted by accused No.1. There was hot exchange of words between accused No.1 and Chandrakant and accused No.3 also immediately rushed at Chandrakant.

5. Thereafter, again there was hot exchange of words in between accused and Kalaskars. Accused Nos. 2 and 3 flashed bricks at Chandrakant. Accused No.2 Raju threw brick at Chandrakant. Accused No.1 Dilip picked up a spade and accused Nos. 2 and 3 held Chandrakant by his shoulder and accused No.1 gave blows after blows on the head of Chandrakant. Blows were continued to be given even after Chandrakant fell down. Accused No.2 slipped from the heaps of bricks and fell down and picked up a hammer lying nearby and gave two blows on the head

of Ashok and one blow was given on the head of Chandrakant. Then the accused left but again while leaving they threw bricks on Chandrakant and Ashok and went away. Thereafter, one Devkar and Jadhav took Chandrakant and Ashok to Shanwar Peth Police chowky. P.S.I. Purohit referred both Chandrakant and Ashok to Sassoon Hospital. P.S.I. recorded statement of Chandrakant. Statement of Ashok was also recorded (Dying declaration of Ashok was recorded). FIR was taken from Chandrakant. Meanwhile Chandrakant died on the night of 7.6.1988. Therefore, the offences which were registered under Sections 326, 504 r/w. 34 of IPC were accordingly altered to under Section 302 of IPC. After completing the investigation, charge sheet was filed.

6. Initially the defence of the accused was of total denial. But during cross examination and arguments before the trial court, their defence was that the accused were attacked by the complainant's side, they retaliated and acted in self defence, they did not use the spade as alleged but the injuries were caused by throwing stones and pelting of bricks.

7. Trial court accepted the defence of the accused and disbelieved the prosecution case and acquitted the accused, and, therefore, this appeal by the State against acquittal of the accused.

8. Learned APP contended that work of development of construction was entrusted to the accused. They were not doing the work according to the agreement and therefore complainant rightly questioned them. The accused did not like the obstruction and questioning in the construction work and therefore they attacked deceased Chandrakant with spade and hammered repeatedly and also caused injury to the other witnesses. Learned APP contended that appreciation of evidence by the trial court is totally perverse. Alternatively, he submitted that this was the case of exceeding the right of self defence because accused had caused injuries to the victim and the witnesses which were more than necessary at that particular time. He therefore contended that the judgment is liable to be set aside and accused were liable to be convicted.

9. On the other hand, Counsel for the accused contended that the incident is of 1988. Accused were acquitted in 1989 by the trial court. The trial court has considered all aspects of the matter properly and upheld the defence of the accused that they acted in self defence and there was no perversity in the judgment of acquittal and this appeal was liable to be dismissed.

10. We have given our anxious consideration to the submissions made by both the sides at length, and we find that the judgment of the trial court does not require any interference for the following reasons:

. First important witness in this regard is P.W. 3 Dr. Sunil Nanadkar, who performed post mortem. He found following injuries on the person of deceased Chandrakant and he stated as under :

External injuries :

1. Lacerated wound left frontal region of scalp 7 cms. above medical end of left eye-brow, oblique - edges dark red oblique size 4 x 5 x 6 Cls. bone deep, 3 stitches seen.

2. Oblique lacerated wound, left frontal region of scalp, 2 cms. behind wound No.1 size : 2.5 x 3x5 cms. dark red bone deep.

3. Oblique lacerated wound, left parietal region of scalp 4 cms. behind wound No.2 and 3.5 cms. lateral to sagital suture on left side, size 2 x 3 x 5 cms. dark read.

4. Lacerated wound, right parietal region of scalp, 14 cms. behind (i.e. above) medial end of right eye-brow and 1.5 cms. lateral to the sugital suture on right side, approximately parallel to sagital suture, size : 4 x 3 x 6 cms. bone deep, dark red, five stitches seen.

5. Incised surgical wound (for craniectomi) seen in right temporo pariatal region of the scalp, starting from level of 1 cms above upper limit of right ear pinna, reaching posterior end of wound No. 4 passing again backwards and approximately parallel to sagital suture, length of coronal part is 14 cms. stitches 12 length of sagital (parallel to) 3 cms-stitches 2.

6. Tracheostomy wound seen 1.5 cms. below thyroid prominence in anterior part of neck in midline, size. 4 x 1.5 x 1.5 cms. edges red 3 stitches present.

7. I.V. mark on dorsum of right and near base of right little finger - edges red. col. No. 18.

2. In column No. 18 I have noted following injuries:

1. Fracture of left side of frontal skull bone.

2. Fracture of right temporo patietal region of skull bone. In my opinion all these injuries were ante-mortem.

3. On internal examination, findings are as follows:

19 Column Hedad:

1. Undersurface of scalp in relation to wound Nos. 1, 2, 3, 4, 5. contused and dark red in colour, particularly, right temporo parietal and left frontal regions.

2. Skull-compound committed fracture of left side frontal bone in relation to wound No.1 of Sr. No. 17, 7 cms. above and behind medial end of left superciliary arch, and 3.5 cms. laternal to left of midian play (midline) oblique area about 2 x cms. dark red in-filtration, staining seen.

2. Right temport parital, region of skull vault shows an approximately vertically ovid fractured defect (surgical for craniectomy) margines irregular, edges dark red, size about 4 x 2 cms. Gauze piece seen in the defect, blood stained.

4. Brain

1. Sagital sinus wall shows irregular tear left side and extra dural, hamotome in relation to left fronto temporal region about 300 ml. dark red related cerebral surface shows pressure groove. Right temporo parietal extra dural haemtoma about 250 ml. dark red related cerebal surface shows pressure groove (cavity) Intra ventricular haemorrage about 50 ml. dark red Brain pale, weight 1390 gms."

However, Doctor has stated that external injury No.1 can be related to internal injury No.1 in the skull column. External injury No. 2 is related to injury No. 1 under the Column head and injuries Nos. 3 and 4 in Column No. 17 were related to injury No.1 under the clause Head and injuries 5, 6 and 7 were surgical wounds for treatment purpose. He further stated that external injury No. 1 to 4 with corresponding internal damage to skull and brain were possible by hammer and injury No.1 was possible by weapon Hammer - Article No. 28 and injury Nos. 1 to 4 were sufficient in ordinary course of nature to cause death. However, in the cross-examination doctor admitted that Injury No.1 is possible if a person falls with sufficient force on a hard projecting surface and each of the injuries Nos. 1, 2, 3 and 4 are possible if the stone or a brick is thrown at a person separately in each instance. He also agreed that injury nos. 1 and 2 may be possible by single fall on hard and blunt substance. Since the doctor has given the aforesaid admissions in the cross examination, counsel for the Accused contended that the defence raised by the accused was rightly accepted by the court.

11. We will have to verify this from the evidence of eye witness. Important witness of the prosecution in this regard is P.W. 8 Ashok Narayan Kalaskar - brother of deceased Chandrakant. Since there is no dispute by the accused about the contract work being given to them, that part of the evidence of this witness need not be considered. So far as incident is concerned, it occurred on 7.6.1988 and in that regard the witness says as usual he and Chandrakant went to the construction site at 10.30 a.m. They found that the work of construction of the 3rd floor walls was going on. They stopped that work, came down and again went to the 3rd floor at 12 O'clock, where all the accused came. They questioned the witness and his brother Chandrakant why the work was stopped. Hot words were exchanged between them and then according to him is the following incident that occurred:

. During this hot exchange this witness tried to pacify everybody but while this was going on accused No.3 started hurling abuses and accused No.2 flashed bricks at his brother chandrakant. Accused No.2 threw a brick at his brother. Witness diverted his attention to accused No.2 and accused No.1

picked up a spade. Accused nos. 2 and 3 caught hold of shoulders of Chandrakant. Chandrakant shouted for help and called his sister in law. Another blow with spade was given by accused No.1. Witness Ashok intervened and grabbed the waist of accused No.1 but accused No.1 again dealt another spade blow on his head i.e. Ashok's head. Chandrakant fell down. Then accused No. 2 picked up the spade from the ground and gave a blow on the head of Chandrakant. There was heaps of bricks and therefore accused No.2 slipped from heap of bricks and fell down but he picked up a hammer lying nearby and gave two blows on the head of Ashok. Accused No.2 also while leaving gave a blow by hammer on the head of Chandrakant and thereafter all the accused went away. Before leaving they threw bricks at Chandrakant and Ashok and gave abuses. Both of them were taken to police chowky and then they were referred by PSI Purohit to Sassoon Hospital. Ashok had stated that before going to the hospital, Chandrakant narrated the incident to PSI Purohit and that his statement was recorded. (According to the defence this becomes FIR not produced by the prosecution).

12. Witness Ashok further says that police came in the Sassoon Hospital, recorded his statement and obtained his thumb impression as he was unable to sign. Then Ashok was removed to Jahangir Nursing Home on the same day. Where on the next day Magistrate came and recorded statement of Ashok. He has stated that he was in Jahangir Hospital for 13 days where his supplementary statement was also recorded. He identified hammer Article No. 28 and Spade Article No. 8. In the cross-examination this witness admitted that before he and Chandrakant reached to the police chowky his sister Pushpa Patange and sister-in-law Pushpa Kalaskar had already reached there to inform the incident. He admitted that in his presence P.S.I. Purohit made enquiry with his brother at police chowky and the complaint of Chandrakant was recorded and then both of them were referred to the Sassoon Hospital. He also admitted that he was arrested on 13.9.1988 in connection with the complaint lodged by accused No.1 regarding the incident dated 7.6.1988 i.e. the aforesaid incident which is the case of the prosecution.

13. The learned counsel for the accused pointed

out that there are number of omissions and contradictions in the evidence of Ashok and all of them are material. He drew our attention to the cross - examination, wherein we found following admissions:

1. Ashok did not tell the police that mason, contractor, helper and other labourers were present at the site at 10.30 a.m.

2. He did not tell police that he and his

brother went to the site at 10.30 a.m.

3. Ashok has told the police that they asked the accused to finish the construction of their share on the ground floor and later on start construction on the 3rd floor but that is not there in his police statement dated 7.6.1988.

4. Ashok told the police that accused no.1 told them that he would not finish the construction work and hence there was

exchange of words and hurling of abuses.

5. Ashok told the police that immediately accused No.3 rushed at Chandrakant. It is not there in his statement.

6. Ashok did not tell police that he pacified the accused that the dispute will be resolved on the next day and that the accused No.3 hurled abuses at them.

7. Ashok told the police that accused No.1 dealt another spade blow over the head of Chandrakant. It is not there in the statement.

8. Ashok told the police that he grabbed accused No.1 by his waist and he raised the spade in his hand. It is not there in his statement.

9. Ashok told the police that accused No.2 struck a blow by spade over the head of Chandrakant. it is not there in the statement.

10. Ashok told the police that two hammer blows were given on his head by accused No.2 Raju. It is not there in his statement.

11. Ashok told the police that while leaving accused No. 2 dealt one hammer blow on the head of falling Chandrakant. It is not there in his statement.

12. Ashok told the police that at the time of incident contractor Devkar and watchman Kale were present. It is not there in his statement.

The aforesaid omissions or contradictions according to the counsel for the accused are material creating doubt about the veracity of the witness and the evidence, which he has given in the court and therefore the trial court rightly rejected the prosecution case.

14. The defence version of acting in self defence is put to this witness Ashok in paragraph 5 of the cross - examination. It is true that all

those suggestions were denied by this witness but the suggestions that Chandrakant and Ashosk rushed at accused nos. 1 and 2 to beat them; that deceased Chandrakant was armed with spade and he rushed towards the accused to hit them; that while doing so Chandrakant fell on the heaps of bricks with spade in his hand and sustained injuries to his head after slipping.

15. Counsel for the accused further urged that though this witness has repeatedly urged that hammer was used to give blows on his head as well as on the head of Chandrakant, the story of use of hammer gets belied by the finding of the hammer during investigation on the second floor of the building, whereas in fact this assault took place on the 3rd floor.

16. Further, the learned Counsel for the accused relied upon the evidence of P.W. 13 Dr. Rajendra Bhoge, who had examined Ashok. He has noted the following injuries on the person of Ashok:

1. There was sutured wound at left parieto-oocipital region, 3" long.

2. Laceration of right frontal region, 1 cm. x 1 cm.

3. There was right black-eye.

4. Abrasion on right side of the chest 3" x 1/2".

5. Swelling of left 4th methocarpo phalangeal. There was no fracture clinically.

6. C.L.W behind the left ear, 1" x 1/4" x 1/4".

7. 2 small abrasions on pinna of left ear.

Doctor has stated that all these injuries must have been caused by hard blunt object such as hammer and spade. In the cross-examination doctor admitted that hammer Article 28 was shown to him which was weighing more than 1 kg. and that if the hammer blow was given it would have resulted in fracture of the skull bone.

17. From this admission of the doctor and the absence of any injury on the skull bone, counsel for the accused contended that the story of using hammer gets falsified by this admission.

18. Thereafter, our attention was drawn by the counsel for the accused to the evidence of one independent witness P.W. 4 Sanganna Basappa Kerur. He was knowing the accused who had taken the construction work of the building. He has stated that on the date of the incident he had gone there at about 10.30 a.m. Two persons were there one was with spects (he was deceased Chandrakant). This witness was acting as Mukadam at site and was giving instructions to mason. Then Chandrakant stopped the masonary work. At about 11 a.m. or 12 noon accused Nos. 1 and 2 arrived and they questioned why the work was stopped. P.W. 4 told them about the order given by Chandrakant. (It is to be noted that this witness has referred Chandrakant as "Bespectacled man"). Then about the incident he has stated that Chandrakant picked up a brick from the floor and while picking up a brick from the floor he fell down on the heap of bricks but immediately he picked the spade in his hand and therefore sensing trouble and the witness ran down and went towards his house. Permission was given to the Prosecutor to contradict the witness on his statement under Section 162 of the Cr.P.C. He denied all the suggestions put to

him by the Prosecutor to the effect that accused No. 1 snatched the spade from the hand of Kalaskar and dealt two blows on the head of Kalaskar. He also denied that thereafter scuffle ensued between Balu Kalaskar and Sanjay Mohite and then the accused No.2 gave blow with spade on the head of Chandrakant. He also denied the suggestion that accused No.2 lost his balance, fell on the heap of bricks and then caught hold of one hammer and dealt a blow on the head of Balu Kalaskar and Chandrakant (Balu Kalaskar is Ashok Kalaskar). In the cross examination he admitted that hammer was not needed for masonary work and there was no such hammer lying at the place of incident on that day. He admitted that Chandrakant and other persons rushed at accused Nos. 1 and 2 with spade in his hands to assault them.

19. Learned counsel for the accused therefore contended that this witness P.W. 4 Keru (Mukadam at the site) is an independent witness and he was not declared hostile and inspite of confronting with his statement under Section 162, he has narrated the truth, which supports the case of the defence that they acted in self defence or injuries were suffered by Chandrakant and Ashok as a result of fall or

throwing of bricks.

20. Many other witnesses were examined by the prosecution. Most of them were declared hostile.

21. Panchnama of the scene of offence is Exhibit 13. Two pieces of bricks stained with blood found lying on the spot, shavel was lying with blood stains, there were stains on stair case, cement and they recovered sand stained with blood, two pieces of stained bricks, one spade, one iron shovel with blood stains was found. No hammer was recovered.

22. P.W. 9 Pushpa - sister of deceased Chandrakant and witness Ashok was also examined by the prosecution. She heard shouts as ’Vahini’ She therefore went to the 3rd floor along with her sister in law Pushpa. She saw spade in the hand of accused No.1, hammer in the hand of accused No.2 and brick in the hand of accused No.3. She also saw her brothers stained with blood. Then they left to lodge complaint but when they went to Shanwar Peth Police Chowky all the accused were already present there. It is pertinent to note that Ashok had admitted that Ashok was arrested in respect of

complaint lodged by the accused in respect of the very same incident.

23. The most important piece of evidence that was relied upon by the counsel for the accused was the dying declaration of Ashok. It is true that since Ashok survived this could not be read as dying declaration, therefore, the trial court took it on record as previous statement of Ashok and exhibited it at Exhibit 39. In his statement when questioned as to how Ashok received injuries he has stated as under:

> **"Yesterday at about 12 p.m. construction was going on at R. No. 712 Budhwar Peth Pune. At that place Raju Mohite assaulted me with the help of hammer on my head and Dilip Mohite & his brother throw bricks on me & therefore I became injured."**

24. Learned counsel for the accused pointed out that if this is accepted as statement of accused, then the entire evidence given by Ashok about assault on his brother Chandrakant becomes falsified because there is no whisper about that part of the prosecution story in the statement of Ashok.

25. Learned counsel for the accused also relied

upon the evidence of P.W. 10 Dr. Vyankatesh Ingale, who examined accused no.3 as having following three injuries :

> **1. Linear abrasion over face - left side of the nose, covered with scab, brownish in colour.**
>
> **2. Linear abrasion over left side of the neck, covered with scab, brownish in colour.**
>
> **3. Abrasion over left side of fore-arm, posteirorly mid-one third, covered with scab, brownish in colour."**

26. In this background that the trial court accepted the story of the defence and acquitted them. Looking therefore to the material omissions and contradictions in the evidence of Ashok, the fact that other independent witnesses have turned hostile, that witness P.W. 4 Kerur supported the defence story, that one of the accused had injuries and the opinion of the doctor that all injuries on deceased Chandrakant and victim Ashok could be caused by throwing of bricks and the fact that hammer was not found on the spot, are the circumstances on the basis of which the trial court rightly disbelieved the prosecution case or in any

case accepted the defence and acquitted the accused, the judgment cannot be said to be perverse and therefore no interference is called for. In the result, Appeal is dismissed. Bail Bonds stand cancelled.

(D.G. DESHPANDE, J.)

(S. R. SATHE, J.)